IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR1690/17

In the matter between:

GLENCORE OPERATIONS SOUTH AFRICA (PTY) LTD (LYDENBURG SMELTER) **Applicant**

and

NUMSA OBO WILLEMGABRIEL JORDAAN **First Respondent**

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION **Second Respondent**

DAVID MAREI SELLO, *N.O* **Third Respondent**

Heard: **07 August 2019**

Delivered: **07 August 2019**

***EX-TEMPORE* JUDGMENT**

CELE, J

Introduction

[1] The application before me is one brought in terms of section 145 (2) of the Labour Relations Act[1] (LRA) where the applicant seeks to review and set aside the arbitration award issued by the second respondent (the Commissioner) under the auspices of the third respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA) dated 26 June 2017 wherein it found the dismissal of Willem Jordaan who is a member of the first respondent, NUMSA (the union) to have been unfair.

[2] The applicant seeks to be granted an order in the following terms:

> '1. Reviewing and setting aside the arbitration award by the third respondent on 26 June 2017 in the arbitration proceedings between the applicant and the first respondent under the auspices of the second respondent under case number MEMP2952.
> 2. Substituting the decision of the third respondent with the decision of this court that the dismissal of Mr Willem Gabriel Jordaan was substantively fair, alternatively referring the matter back to the second respondent for determination afresh by a commissioner other than the third respondent.
> 3. Granting the applicant further and alternate relief and directing the respondents who oppose this application to pay the cost of this application jointly and severally, the one paying others to be absolved.'

[3] This application has been opposed by NUMSA, acting on behalf of it's member, Mr Willem Gabriel Jordaan (the employee).

[4] Mr Masutha, in preparing his heads of argument, began by alluding that the facts, as summarised by counsel for the applicant, whom I think this is Mr Mac, appears to be correct. Therefore, he conceded that those facts appear

[1] No. 66 of 1995, as amended.

to, in general, be common cause. He confirmed this at the beginning of his address today therefore I will take those facts to be common cause.

Background

[5] The employee commenced his employment with the applicant on 4 November 2014. He held the position of assistant supervisor of machinery. He is often referred to as a maintenance coordinator. The applicant operates a chrome smelting plant at Lydenburg in Mpumalanga.

[6] The employee was appointed in terms of the General Machinery Regulation in terms of section 2(7) of the Occupational Health and Safety Act[2] (OHSA). He had various duties which included ensuring that he reports in writing any deviations that he is unable to rectify to an engineering manager, often referred to as a GMR2(1) who is appointed in terms of section 16(2) of the OHSA.

[7] The employee had to ensure that he informed this engineering manager of any queries, difficulties or any issues that he is unable to resolve. He had to ensure that the operational integrity of the plant equipment, structures, processes and protective systems are monitored and assured on an ongoing basis. He had to ensure that hazards are identified, assessed and, as far as reasonably possible, eliminated or treated to avoid any employees working in the mine from getting injured or being killed.

[8] He had to perform all reasonable instructions given to him by those that were senior to him. He had people reporting to him as well and he therefore also had to monitor their services and ensure that whatever instructions given by him were followed upon.

[9] He reported to a Mr Christo Venter. On 18 November 2015 Mr Venter gave the employee an instruction to fix the guarding on the Grizzly loose, on what is

[2] No. 85 of 1993.

known as the M662 feeder. Mr Venter left it there and did not follow-up as to whether his instructions were followed.

[10] On 20 January 2016, that is the following year, the employee processed or did a handover of his duties to Mr Caswell Shabangu. This was because the employee was scheduled to take his vacation leave from 21 January 2016 and would be on leave for about a week or so.

[11] Just a day after the handover had been done, on 21 January 2016, Mr Venter together with the applicant's management team inspected the plant, in particular the section of the plant that the employee was responsible for. During that inspection Mr Venter and the applicant's management team discovered four deviations, including the guarding on the M662 feeder and on the CV661 tail pulley.

[12] As a result of these deviations, Mr Venter and management were of the view that the employee did not comply with instructions given to him on 18 November 2015 to fix the guarding on the M662 feeder. In addition, Mr Venter and management noted that the employee failed to provide feedback to Mr Venter regarding the instruction that had then been given in November 2015.

[13] In the circumstances, it was decided to charge the employee with acts of misconduct. These were described in the following terms:

> "Failure to adhere to SHEQ procedures, rules and regulations that apply and gross negligence in that on 21 January 2016 it was discovered that you allegedly failed to make sure that the following item within your area of responsibility or items within your area of responsibility are up to standard, namely: Grizzly loose over the hole and not fixed. Primary crusher gate not locked. CV661 tail pulley guard not fitted and CV661 drive pulley or drive pulley guard open on the side."

[14] An internal disciplinary enquiry was convened and after all evidence was led, the employee was found guilty of the misconduct he was charged with,

particularly misconduct in respect of the M662 feeder and the CV661 tail pulley. I think he would have been acquitted of the other two, because there were four deviations that had been found.

[15] At the time when he was found guilty, it remained common cause that he had a valid final written warning which related to the failure to comply with the applicant's safety rules and standards. The chairperson therefore decided to impose a sanction of dismissal. It was felt that in progressive discipline there was no appropriate sanction other than a dismissal.

[16] The employee lodged his internal appeal against this decision, but that appeal was not successful. As a member of the first respondent, the dispute that had arisen was referred as an unfair dismissal dispute to the CCMA for conciliation. Conciliation failed to resolve it and it was referred to arbitration. The third respondent was appointed to arbitrate this dispute.

[17] I need not then deal extensively with the findings of the commissioner in that presently before me there is no counter review application. I can just add that when the commissioner had analysed all the evidence before him, he found the employee to be guilty of the misconduct with which he was charged. With that finding having been made, the commissioner had then to apply his mind on the appropriateness of the sanction.

[18] Mr Venter had testified and in his evidence it had been conceded that after the finding of the defect on 21 January 2016 in relation to what the employee was supposed to do, these were left unattended for about a week until the employee came back. Mr Venter also conceded that he did not follow up on the November 2015 instruction to make sure that it had been carried out.

[19] The commissioner, considering these concessions by the supervisor, Mr Venter, then said the following of concern in these proceedings.

> "50. Turning to the evidence of Mr Abraham Christoff Venter who conceded to have had an element of discrepancy on his part of

superintendent in as far as safety is concerned. He stated again that the whole team, that is himself included, is responsible for safety in case there is fatality. He also agreed with the applicant that Mr Shabangu would have carried out the task. He did not inspect the area, which was supposed to be welded, but dispute that it was welded to satisfactory condition.

51. Mr Abraham Christoff Venter, according to evidence, discovered the discrepancies on 18 November 2015. Discrepancies needed an urgent attention, according to him, but he did not follow it up because the instruction was given to applicant. Yet he had a responsibility to ensure that the applicant followed the instruction.

52. I find the action of Mr Abraham Christoff Venter to be inconsistent with his responsibilities. I find that the respondent was not consistent in applying a rule relating to discipline, as it is clear that Mr Abraham Christoff Venter saw the deviation and did nothing. It is my view that it is deviations. If the deviations needed urgent attention from the applicant, they also needed the same sense of urgency from Mr Abraham Christoff Venter.

53. Lastly, the applicant raised inconsistency with regard to Mr Moses Maisela who was dismissed for breaching the same safety rule and later re-employed, as well as the matter of Mr Elvis Mnisi whose company is having business with the respondent.

54. It should be mentioned that the case of the applicant is not about the respondent failing to re-employ or reinstate after dismissal, but the dismissal related to misconduct. I find that the respondent is not inconsistent in this area.

55. Taking the whole evidence presented before me, I find that the respondent failed to consistently apply the rule relating to safety in terms of safety to subject Mr Abraham Christoff Venter to disciplinary hearing. The finding renders the dismissal substantively unfair.

56. I find the reinstatement law to be appropriate remedy under the circumstances. I have also taken into account the length of period that has lapsed since the applicant was dismissed."

[20] The applicant then approached this Court on review seeking to challenge the findings of the commissioner that I have briefly made reference to and the decision made by the commissioner.

Grounds of review

[21] The applicant alleges that the commissioner committed, among others, gross irregularity and exceeded powers. It is said that this he did when he took the decision to determine whether the applicant was inconsistent in the application of discipline with reference to Mr Venter. This is so because it was common cause at the arbitration that the employee challenged the alleged inconsistent application of the discipline by the applicant with reference to only Mr Maisela and Mr Mnisi, not Mr Venter.

[22] Pausing here for a moment; it really was the case that the only people who were mentioned as the subject of any inconsistent disciplinary procedures were Mr Maisela and Mr Mnisi. Mr Venter was not cited. One can understand that he could not be cited, because he had committed no misconduct at that stage, as appears on record.

[23] Now, was the commissioner entitled to use the evidence unfolding before him to find inconsistent application of a disciplinary policy in relation to Mr Venter is the main issue for consideration before Court. Arbitration proceedings are not preceded by pleadings as is the case in the high court here or in the Labour Court as well. What is very important, however, are the opening remarks of the parties, but also the closing remarks. The opening remarks of the parties are important in that they inform the commissioner what issues are serving before that commissioner.

[24] So at the beginning of the arbitration hearing and during the evidence it was always made clear that the inconsistent application of the disciplinary procedure related to only two persons, and these two persons did not include Mr Venter. So from the very beginning of the arbitration hearing the applicant was not alerted to the fact that it might have to apply its mind to the

inconsistent application of a disciplinary principle in relation to Mr Venter. That issue was never raised really by the first respondent so that during the arbitration the applicant would be able to apply his mind and lead relevant evidence in relation to that very issue.

[25] The commissioner *mero motu* went on to embark on this mission. Clearly when he did so, he deviated from what ought to have been done by a commissioner and he allowed some kind of a trial by ambush. He therefore introduced an issue which had never served before the parties, even as an introduced issue.

[26] A guiding case on this principle is found in *ZA1 (Pty) Ltd t/a Naartjie Clothing v Goldman and Others*[3]. In that decision a principle is made out clearly that opening remarks of the parties are important and they indicate and give a guideline to a commissioner what the issues are that the parties are coming to deliberate on, and also the closing remarks of the parties. In this case there was a clear deviation by the commissioner, taking the applicant by surprise. That, in my view, does amount to a gross irregularity as defined in the LRA.

[27] There is a certain consideration. It talks to the fact that the employee had a similar valid previous misconduct. Therefore, when he was dismissed, it was because the employer was applying progressive discipline and yet no evidence was brought by anyone to indicate that Mr Venter was similarly circumstanced so that one could argue that the comparator or the comparison was of apples only and not apples and oranges. Therefore, the comparison that the commissioner relied on really was unfair because there never was any evidence led about it. Clearly the commissioner exceeded his powers when he went out of his way and relied on the concessions made by Mr Venter about him having kept this place unsafe for about a week.

[28] In my view, it is this very conduct by the commissioner which made him arrive at the conclusion that he did. Had he not embarked on this enquiry about Mr

[3] (2013) ILJ 2347 (LC).

Venter, he would be left with having to compare the position of the employee with the other two persons that had been mentioned. We do not know if those two people had any previous acts of misconduct or any valid final written warnings, as it were but here we know that there was a final written warning.

[29] Clearly, therefore, the third respondent arrived at a decision which a reasonable decision-maker could not have arrived at on the evidence that should have served before the third respondent and clearly, therefore, the applicant has made out a case for the review of the arbitration award in this case, which should not be allowed to stand.

[30] I remind myself that the employee had been found guilty by the employer and had been dismissed. It was but for the finding of the commissioner that he was saved and a reinstatement order was made. In my view, had the commissioner not committed this gross irregularity, he would have found that the sanction of dismissal was in the circumstances very much fair and would have left the decision of the employer to dismiss intact and without interference.

[31] Accordingly, the following order is made:

Order:

1. The arbitration award is reviewed to the extent that it relates to the sanction.
2. It is found that the dismissal of Mr Jordaan by the applicant was fair in the circumstances.
3. No cost order is made.

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H. Cele

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Mr D Masher from Edward Nathan Sonnenbergs Inc
For the Respondent:	Mr Sello Mogare (Union Official)